Further, if the theory is eventually determined to be correct, the proceedings before this Court will be rendered a nullity upon commencement of the second trial. The instant proceeding, in such event, represent the sole manner of exercise of the statutory right of appeal from what we consider, an abortive effort by the Government on the first trial to prove the several charges of the indictment.

III.

In his petition for writ of certiorari, petitioner presented as his fourth question that, when he makes his motion for judgment of acquittal demonstrating the insufficiency of the prosecutor's case, and his motion is denied and new trial ordered, has he not, in the exercise of his right to so move, been required to cooperate in his own prosecution in the proof and theory of a second prosecution?

On the 28th of January, 1960, since this Court's denial of certiorari, the government moved the trial court for leave to file an amended bill of particulars, demonstrating its intent to introduce proof of petitioner's obtaining money by false pretenses and representations from four insurance companies not named in the indictment, nor in the bill of particulars furnished before the first trial, and seven additional witnesses, none of whom is named in the indictment, nor in the bill of particulars furnished before the first trial (App. 1-2). The additional proof is for the announced purpose of proving the scheme: (Tr. 10, January 28, 1960). The motion was granted by the trial court on February 2, 1960.

The petitioner submits that the question originally presented as a theoretical proposition has become an actuality. He has pointed out the deficiencies in the government's first effort to convict him. A second effort is about to be made after deficiencies pointed out in the first.

None of the proposed amendments to the bill of particulars has any apparent relation to the charges of the indictment. (Tr. 9, January 28, 1960). Petitioner is confronted with an effort to convict him of charges never made heretofore by the Grand Jury, on the flexible principle dealing with the admissibility of extra indictment offenses to show a felonious scheme. Since the government failed in its effort to convict him of the charges made, we submit it now will make attempt to convict him on the general claim that he is a bad man on charges not made with indictment. The urgency of review of the first record is manifest.

CONCLUSIONS.

Wherefore, we respectfully pray a petition for rehearing be granted.

Respectfully submitted,

MAURICE J. WALSH
105 West Adams Street
Chicago 3, Illinois

ANNA R. LAVIN
209 South LaSalle Street
Chicago 4, Illinois
Attorneys for Petitioner

State Of Illinois }
County Of Cook } ss.

AFFIDAVIT

Anna R. Lavin, being on oath first duly sworn, deposes and says that she is one of the counsels for the petitioner in the foregoing petition for rehearing;

That petition for rehearing is confined to intervening circumstances since the denial by this Court of the petition for certiorari filed herein, particularly this Court's ruling in *Stirone* v. *United States*, No. 35, October Term 1959, January 11, 1960; and the proceedings in the trial court of January 20, 1960 and January 28, 1960 (filed herewith as Exhibit "A"; and pertinent portions thereof are set forth in the Appendix);

That this petition is presented in good faith and concerns an interpretation impressed upon these proceedings by government counsel and the trial court which, if correct, will render the proceedings before this Court a nullity upon commencement of the second trial and therefore the instant proceeding represents the only form of available relief;

That this petition is not interposed for purpose of delay and no delay will be effectuated hereby, since the second trial of the instant cause has been set by the trial court, at the request of the government counsel and in the convenience of the said Court for March 28, 1960, to which said setting the defendant deferred entirely to the pleasure of the said trial court (Tr. 6, 16 and 17, January 20, 1960).

Further affiant saith not.

.....

Subscribed and sworn to before
me this ..... day of ....., 1960.

..... Notary Public

APPENDIX.

UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

UNITED STATES OF AMERICA
v.
NATHAN W. SHAVIN
No. 56 CR 644

AMENDED BILL OF PARTICULARS

Now comes the United States of America by R. Tieken, United States Attorney for the Northern District of Illinois, and, pursuant to the order of court granting leave to file an Amended Bill of Particulars, furnishes the following names and last known addresses of the former clients of the defendant, concerning whom the Government intends to offer evidence upon the trial of this cause, which names and last known addresses are in addition to those set out in item 2 of the original bill of particulars and constitute an amendment to said item of the original bill of particulars:

Elmer Lewis and Alberta Lewis
2204 W. 13th Street
Chicago, Illinois

Anna Wigger
2534 Orchard Street
Chicago, Illinois

2 Alice Danecki
1759 West 48th Street
Chicago, Illinois

Peter Krygowski
3949 South Campbell
Chicago, Illinois

Sam Finer
3434 West Monroe Street
Chicago, Illinois

Loretta Schaffer
5344 South Halsted Street
Chicago, Illinois

Evidence relating to the foregoing clients of the defendant will include evidence of submission of false medical bills to the following insurance companies and corporations in addition to those companies specifically mentioned in the indictment:

Allstate Insurance Company
Standard Accident Insurance Company
State Farm Mutual Insurance Company
The Chicago Transit Authority

/s/ R. Tieken
R. Tieken,
United States Attorney.

JFG:me

TRANSCRIPT OF PROCEEDINGS
of January 20, 1958

1-5 • • •

6 • • • Mr. Walsh: May I say this: I have never taken the position that your Honor was stayed by our action or that we had what might be called supersedeas.

The Court: I resolved the doubt in favor of the defendant.

• • •

7-15 • • •

16 • • • I will hear from you, Mr. Brady.

Mr. Grady: I have a motion pending here, your

Honor, to the effect that if the case is not reached by January 25th, on which date it is presently set for trial, that the matter be continued until February 18th. The basis for that motion is that one of my witnesses had longstanding plans to be out of town. Since I made that original motion, there have been other matters that have come up of a similar nature, and in addition our exhibits are still up in the Supreme Court. We are doing our best to get them down, but I have no way of knowing exactly when they will get here.

Therefore, I would like to change the motion that I have on file now to a motion to set this trial some time after the middle of February; that is, to reset it from January 25th until some time after the middle of February.

The Court: Mr. Walsh, I will hear from you on a set date.

Mr. Walsh: So far as trial is concerned, your Honor, we are at your pleasure, Judge.

17 The Court: That is fine.

We will try this case on Monday, March 28 at ten o'clock.

Reset it, Mr. Clerk, from January 25th to March 28th at ten o'clock.

18 • • •

TRANSCRIPT OF PROCEEDINGS
of January 28, 1958

1 • • • The Clerk: United States of America versus Nathan W. Shavin, motion of the Government to file an amended Bill of Particulars.

The Court: For leave to file?

Mr. Grady: For leave to file an amended bill of
2 particulars. Our original bill of particulars in response to the defendant's motion set out certain

names and addresses of persons as to whom false medical bills were allegedly submitted by the defendant.

At this time the Government wishes to amend the original bill of particulars by adding certain additional names, seven in all.

The Court: You say "by adding additional names."

Mr. Grady: Additional names of former clients of the defendant as to whom false medical bills were submitted

• • •

3 • • • Mr. Walsh:

• • •

4 • • • I have not seen his proposed amended bill of particulars, but one of the things we complained about was this:

"Has not the defendant in the exercise of his right to move for acquittal been required to cooperate in his own prosecution on a second trial by indicating deficiencies in the proof and theory of the prosecution?"

And we called attention to the prosecutor's statement in his closing argument to the effect that

"The next time I will know better and keep my mouth shut."

Then it says:

"See prosecutor's argument concerning one point."

Now the prosecutor seeks to change the whole sense of the prosecution by adding extra indictment offenses, apparently,

• • •

6 • • • I contend here that we have at this late point after a trial, the addition of extra indictment offenses which changes the theory of the indictment as had been laid down, and as we have gone through it on trial once.

The Court: As far as the trial that we have gone through is concerned, that is a nullity here, except insofar as one side or the other might wish on the trial to

try to impeach witnesses who testify on the second trial because of what they testified to on the first trial.

The Court of Appeals has dismissed your appeal from my order denying a judgement of acquittal. I don't think I must consider anything here as to what went on in respect to the first trial. I know you don't agree with that, but that is my view.

Mr. Walsh: I don't agree on this point, I simply say that we were entitled to an acquittal at the close of all evidence in the last trial.

We haven't lost that right and that trial is not a nullity so far as that is concerned.

• • •

8-9 • • •

10 The Court: Now on what legal basis would I be obligated to receive that?

Mr. Grady: The legal basis, your Honor, would be that the indictment charges a scheme concerning clients. It doesn't limit the clients, and concerning insurance companies and medical bills, without limiting the insurance companies or the medical bills.

These are more clients, more medical bills, more insurance companies; therefore, they are included and can be included within the four corners of the indictment.

Now secondly, with reference to the specific question your Honor asked, even if that were not true, evidence of similar transactions is admissible on the question of intent and to show the scheme.

So there are two grounds upon either of which this evidence would be admissible.

The Court: Part of the scheme and artifice?

Mr. Grady: That is correct.

• • •

11-15 • • •